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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

ABANTE ROOTER AND PLUMBING) Case No.

INC, individually and on behalf of all)
 others similarly situated,)

Plaintiff,)

vs.)

MERCHANT INDUSTRY, LLC; and)
 DOES 1 through 10, inclusive,)

Defendant.)

CLASS ACTION

**COMPLAINT FOR VIOLATIONS
 OF:**

1. NEGLIGENT VIOLATIONS
 OF THE TELEPHONE
 CONSUMER PROTECTION
 ACT [47 U.S.C. §227(b)]
2. WILLFUL VIOLATIONS
 OF THE TELEPHONE
 CONSUMER PROTECTION
 ACT [47 U.S.C. §227(b)]
3. NEGLIGENT VIOLATIONS
 OF THE TELEPHONE
 CONSUMER PROTECTION
 ACT [47 U.S.C. §227(c)]
4. WILLFUL VIOLATIONS
 OF THE TELEPHONE
 CONSUMER PROTECTION
 ACT [47 U.S.C. §227(c)]

DEMAND FOR JURY TRIAL

1 Plaintiff ABANTE ROOTER AND PLUMBING INC (“Plaintiff”),
2 individually and on behalf of all others similarly situated, alleges the following
3 upon information and belief based upon personal knowledge:

4 **NATURE OF THE CASE**

5 1. Plaintiff brings this action individually and on behalf of all others
6 similarly situated seeking damages and any other available legal or equitable
7 remedies resulting from the illegal actions of MERCHANT INDUSTRY, LLC
8 (“Defendant”), in negligently, knowingly, and/or willfully contacting Plaintiff on
9 Plaintiff’s cellular telephone in violation of the Telephone Consumer Protection
10 Act, 47 U.S.C. § 227 *et seq.* (“TCPA”) and related regulations, specifically the
11 National Do-Not-Call provisions, thereby invading Plaintiff’s privacy.

12 **JURISDICTION & VENUE**

13 2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff,
14 a California corporation with its principle place of business also in California, seeks
15 relief on behalf of a Class, which will result in at least one class member belonging
16 to a different state than that of Defendant, a New York company. Plaintiff also
17 seeks up to \$1,500.00 in damages for each call in violation of the TCPA, which,
18 when aggregated among a proposed class in the thousands, exceeds the
19 \$5,000,000.00 threshold for federal court jurisdiction. Therefore, both diversity
20 jurisdiction and the damages threshold under the Class Action Fairness Act of 2005
21 (“CAFA”) are present, and this Court has jurisdiction.

22 3. Venue is proper in the United States District Court for the Northern
23 District of California pursuant to 28 U.S.C. § 1391(b)(2) because Defendant does
24 business within the State of California and Plaintiff resides within the County of
25 Alameda.

26 **PARTIES**

27 4. Plaintiff, ABANTE ROOTER AND PLUMBING INC (“Plaintiff”),
28 is a rooting and plumbing business in Emeryville, California and is a “person” as

1 defined by *47 U.S.C. § 153 (39)*.

2 5. Defendant, MERCHANT INDUSTRY, LLC (“CB”), is an entity in the
3 business finance industry, and is a “person” as defined by *47 U.S.C. § 153 (39)*.

4 6. The above named Defendant, and its subsidiaries and agents, are
5 collectively referred to as “Defendants.” The true names and capacities of the
6 Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are
7 currently unknown to Plaintiff, who therefore sues such Defendants by fictitious
8 names. Each of the Defendants designated herein as a DOE is legally responsible
9 for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the
10 Complaint to reflect the true names and capacities of the DOE Defendants when
11 such identities become known.

12 7. Plaintiff is informed and believes that at all relevant times, each and
13 every Defendant was acting as an agent and/or employee of each of the other
14 Defendants and was acting within the course and scope of said agency and/or
15 employment with the full knowledge and consent of each of the other Defendants.
16 Plaintiff is informed and believes that each of the acts and/or omissions complained
17 of herein was made known to, and ratified by, each of the other Defendants.

18 **FACTUAL ALLEGATIONS**

19 8. Beginning in or around November of 2014 and continuing through
20 April of 2017, Defendant contacted Plaintiff on Plaintiff’s cellular telephone
21 numbers ending in -5154, -1636, -7511, -7210, and -0106 in an attempt to solicit
22 Plaintiff to purchase Defendant’s services.

23 9. Defendant used an “automatic telephone dialing system” as defined
24 by *47 U.S.C. § 227(a)(1)* to place its calls to Plaintiff seeking to solicit its services.

25 10. Defendant contacted or attempted to contact Plaintiff from telephone
26 numbers belonging to Defendant, including without limitation (319) 435-4501,
27 (425) 406-9691, and (888) 201-2393.

28 11. Defendant’s calls constituted calls that were not for emergency

1 purposes as defined by 47 U.S.C. § 227(b)(1)(A).

2 12. Defendant's calls were placed to telephone number assigned to a
3 cellular telephone service for which Plaintiff incurs a charge for incoming calls
4 pursuant to 47 U.S.C. § 227(b)(1).

5 13. During all relevant times, Defendant did not possess Plaintiff's "prior
6 express consent" to receive calls using an automatic telephone dialing system or an
7 artificial or prerecorded voice on its cellular telephones pursuant to 47 U.S.C. §
8 227(b)(1)(A).

9 14. Furthermore, Plaintiff's cellular telephone numbers ending in -5154,
10 -1636, -7511, and -0106 have been on the National Do-Not-Call Registry well over
11 thirty (30) days prior to Defendant's initial calls.

12 15. Defendant placed multiple calls soliciting its business to Plaintiff on
13 its cellular telephones beginning in or around November of 2014 and continued
14 until in or around April of 2017.

15 16. Such calls constitute solicitation calls pursuant to 47 C.F.R. §
16 64.1200(c)(2) as they were attempts to promote or sell Defendant's services.

17 17. Plaintiff received numerous solicitation calls from Defendant within a
18 12-month period.

19 18. Plaintiff requested for Defendant to stop calling Plaintiff during one
20 of the initial calls from Defendant, thus revoking any prior express consent that had
21 existed and terminating any established business relationship that had existed, as
22 defined under 16 C.F.R. 310.4(b)(1)(iii)(B).

23 19. Despite this, Defendant continued to call Plaintiff in an attempt to
24 solicit its services and in violation of the National Do-Not-Call provisions of the
25 TCPA.

26 20. Upon information and belief, and based on Plaintiff's experiences of
27 being called by Defendant after requesting they stop calling, and at all relevant
28 times, Defendant failed to establish and implement reasonable practices and

1 procedures to effectively prevent telephone solicitations in violation of the
2 regulations prescribed under 47 U.S.C. § 227(c)(5).

3 **CLASS ALLEGATIONS**

4 21. Plaintiff brings this action individually and on behalf of all others
5 similarly situated, as a member the four proposed classes (hereafter, jointly, “The
6 Classes”). The class concerning the ATDS claim for no prior express consent
7 (hereafter “The ATDS Class”) is defined as follows:

8 All persons within the United States who received any
9 solicitation/telemarketing telephone calls from
10 Defendant to said person’s cellular telephone made
11 through the use of any automatic telephone dialing
12 system or an artificial or prerecorded voice and such
13 person had not previously consented to receiving such
14 calls within the four years prior to the filing of this
Complaint

15 22. The class concerning the ATDS claim for revocation of consent, to the
16 extent prior consent existed (hereafter “The ATDS Revocation Class”) is defined
17 as follows:

18 All persons within the United States who received any
19 solicitation/telemarketing telephone calls from
20 Defendant to said person’s cellular telephone made
21 through the use of any automatic telephone dialing
22 system or an artificial or prerecorded voice and such
23 person had revoked any prior express consent to receive
24 such calls prior to the calls within the four years prior to
the filing of this Complaint.

25 23. The class concerning the National Do-Not-Call violation (hereafter
26 “The DNC Class”) is defined as follows:

27 All persons within the United States registered on the
28 National Do-Not-Call Registry for at least 30 days, who

1 had not granted Defendant prior express consent nor had
2 a prior established business relationship, who received
3 more than one call made by or on behalf of Defendant
4 that promoted Defendant's products or services, within
any twelve-month period, within four years prior to the
filing of the complaint.

5 24. The class concerning the National Do-Not-Call violation following
6 revocation of consent and prior business relationship, to the extent they existed
7 (hereafter "The DNC Revocation Class") is defined as follows:
8

9 All persons within the United States registered on the
10 National Do-Not-Call Registry for at least 30 days, who
11 received more than one call made by or on behalf of
12 Defendant that promoted Defendant's products or
13 services, after having revoked consent and any prior
14 established business relationship, within any twelve-
month period, within four years prior to the filing of the
complaint.

15 25. Plaintiff represents, and is a member of, The ATDS Class, consisting
16 of all persons within the United States who received any solicitation telephone calls
17 from Defendant to said person's cellular telephone made through the use of any
18 automatic telephone dialing system or an artificial or prerecorded voice and such
19 person had not previously not provided their cellular telephone number to
20 Defendant within the four years prior to the filing of this Complaint.

21 26. Plaintiff represents, and is a member of, The ATDS Revocation Class,
22 consisting of all persons within the United States who received any
23 solicitation/telemarketing telephone calls from Defendant to said person's cellular
24 telephone made through the use of any automatic telephone dialing system or an
25 artificial or prerecorded voice and such person had revoked any prior express
26 consent to receive such calls prior to the calls within the four years prior to the
27 filing of this Complaint.

28 27. Plaintiff represents, and is a member of, The DNC Class, consisting

1 of all persons within the United States registered on the National Do-Not-Call
2 Registry for at least 30 days, who had not granted Defendant prior express consent
3 nor had a prior established business relationship, who received more than one call
4 made by or on behalf of Defendant that promoted Defendant's products or services,
5 within any twelve-month period, within four years prior to the filing of the
6 complaint.

7 28. Plaintiff represents, and is a member of, The DNC Revocation Class,
8 consisting of all persons within the United States registered on the National Do-
9 Not-Call Registry for at least 30 days, who received more than one call made by or
10 on behalf of Defendant that promoted Defendant's products or services, after
11 having revoked consent and any prior established business relationship, within any
12 twelve-month period, within four years prior to the filing of the complaint.

13 29. Defendant, their employees and agents are excluded from The
14 Classes. Plaintiff does not know the number of members in The Classes, but
15 believes the Classes members number in the thousands, if not more. Thus, this
16 matter should be certified as a Class Action to assist in the expeditious litigation of
17 the matter.

18 30. The Classes are so numerous that the individual joinder of all of its
19 members is impractical. While the exact number and identities of The Classes
20 members are unknown to Plaintiff at this time and can only be ascertained through
21 appropriate discovery, Plaintiff is informed and believes and thereon alleges that
22 The Classes includes thousands of members. Plaintiff alleges that The Classes
23 members may be ascertained by the records maintained by Defendant.

24 31. Plaintiff and members of The ATDS Class and The ATDS Revocation
25 Class were harmed by the acts of Defendant in at least the following ways:
26 Defendant illegally contacted Plaintiff and ATDS Class members via their cellular
27 telephones thereby causing Plaintiff and ATDS Class and ATDS Revocation Class
28 members to incur certain charges or reduced telephone time for which Plaintiff and

1 ATDS Class and ATDS Revocation Class members had previously paid by having
2 to retrieve or administer messages left by Defendant during those illegal calls, and
3 invading the privacy of said Plaintiff and ATDS Class and ATDS Revocation Class
4 members.

5 32. Common questions of fact and law exist as to all members of The
6 ATDS Class which predominate over any questions affecting only individual
7 members of The ATDS Class. These common legal and factual questions, which
8 do not vary between ATDS Class members, and which may be determined without
9 reference to the individual circumstances of any ATDS Class members, include,
10 but are not limited to, the following:

- 11 a. Whether, within the four years prior to the filing of this
12 Complaint, Defendant made any telemarketing/solicitation call
13 (other than a call made for emergency purposes or made with
14 the prior express consent of the called party) to a ATDS Class
15 member using any automatic telephone dialing system or any
16 artificial or prerecorded voice to any telephone number
17 assigned to a cellular telephone service;
- 18 b. Whether Plaintiff and the ATDS Class members were damaged
19 thereby, and the extent of damages for such violation; and
- 20 c. Whether Defendant and their agents should be enjoined from
21 engaging in such conduct in the future.

22 33. As a person that received numerous telemarketing/solicitation calls
23 from Defendant using an automatic telephone dialing system or an artificial or
24 prerecorded voice, without Plaintiff's prior express consent, Plaintiff is asserting
25 claims that are typical of The ATDS Class.

26 34. Common questions of fact and law exist as to all members of The
27 ATDS Revocation Class which predominate over any questions affecting only
28 individual members of The ATDS Revocation Class. These common legal and

1 factual questions, which do not vary between ATDS Revocation Class members,
2 and which may be determined without reference to the individual circumstances of
3 any ATDS Revocation Class members, include, but are not limited to, the
4 following:

- 5 a. Whether, within the four years prior to the filing of this
6 Complaint, Defendant made any telemarketing/solicitation call
7 (other than a call made for emergency purposes or made with
8 the prior express consent of the called party) to an ATDS
9 Revocation Class member, who had revoked any prior express
10 consent to be called using an ATDS, using any automatic
11 telephone dialing system or any artificial or prerecorded voice
12 to any telephone number assigned to a cellular telephone
13 service;
- 14 b. Whether Plaintiff and the ATDS Revocation Class members
15 were damaged thereby, and the extent of damages for such
16 violation; and
- 17 c. Whether Defendant and their agents should be enjoined from
18 engaging in such conduct in the future.

19 35. As a person that received numerous telemarketing/solicitation calls
20 from Defendant using an automatic telephone dialing system or an artificial or
21 prerecorded voice, after Plaintiff had revoked any prior express consent, Plaintiff
22 is asserting claims that are typical of The ATDS Revocation Class.

23 36. Plaintiff and members of The DNC Class and DNC Revocation Class
24 were harmed by the acts of Defendant in at least the following ways: Defendant
25 illegally contacted Plaintiff and DNC Class and DNC Revocation Class members
26 via their telephones for solicitation purposes, thereby invading the privacy of said
27 Plaintiff and the DNC Class and DNC Revocation Class members whose telephone
28 numbers were on the National Do-Not-Call Registry. Plaintiff and the DNC Class

1 and DNC Revocation Class members were damaged thereby.

2 37. Common questions of fact and law exist as to all members of The
3 DNC Class which predominate over any questions affecting only individual
4 members of The DNC Class. These common legal and factual questions, which do
5 not vary between DNC Class members, and which may be determined without
6 reference to the individual circumstances of any DNC Class members, include, but
7 are not limited to, the following:

- 8 a. Whether, within the four years prior to the filing of this
9 Complaint, Defendant or its agents placed more than one
10 solicitation call to the members of the DNC Class whose
11 telephone numbers were on the National Do-Not-Call Registry
12 and who had not granted prior express consent to Defendant and
13 did not have an established business relationship with
14 Defendant;
- 15 b. Whether Defendant obtained prior express written consent to
16 place solicitation calls to Plaintiff or the DNC Class members'
17 telephones;
- 18 c. Whether Plaintiff and the DNC Class member were damaged
19 thereby, and the extent of damages for such violation; and
- 20 d. Whether Defendant and their agents should be enjoined from
21 engaging in such conduct in the future.

22 38. As a person that received numerous solicitation calls from Defendant
23 within a 12-month period, who had not granted Defendant prior express consent
24 and did not have an established business relationship with Defendant, Plaintiff is
25 asserting claims that are typical of the DNC Class.

26 39. Common questions of fact and law exist as to all members of The
27 DNC Class which predominate over any questions affecting only individual
28 members of The DNC Revocation Class. These common legal and factual

1 questions, which do not vary between DNC Revocation Class members, and which
2 may be determined without reference to the individual circumstances of any DNC
3 Revocation Class members, include, but are not limited to, the following:

- 4 a. Whether, within the four years prior to the filing of this
5 Complaint, Defendant or its agents placed more than one
6 solicitation call to the members of the DNC Class whose
7 telephone numbers were on the National Do-Not-Call Registry
8 and who had revoked any prior express consent and any
9 established business relationship with Defendant;
- 10 b. Whether Plaintiff and the DNC Class member were damaged
11 thereby, and the extent of damages for such violation; and
- 12 c. Whether Defendant and their agents should be enjoined from
13 engaging in such conduct in the future.

14 40. As a person that received numerous solicitation calls from Defendant
15 within a 12-month period, who, to the extent one existed, had revoked any prior
16 express consent and any established business relationship with Defendant, Plaintiff
17 is asserting claims that are typical of the DNC Revocation Class.

18 41. Plaintiff will fairly and adequately protect the interests of the members
19 of The Classes. Plaintiff has retained attorneys experienced in the prosecution of
20 class actions.

21 42. A class action is superior to other available methods of fair and
22 efficient adjudication of this controversy, since individual litigation of the claims
23 of all Classes members is impracticable. Even if every Classes member could
24 afford individual litigation, the court system could not. It would be unduly
25 burdensome to the courts in which individual litigation of numerous issues would
26 proceed. Individualized litigation would also present the potential for varying,
27 inconsistent, or contradictory judgments and would magnify the delay and expense
28 to all parties and to the court system resulting from multiple trials of the same

1 complex factual issues. By contrast, the conduct of this action as a class action
 2 presents fewer management difficulties, conserves the resources of the parties and
 3 of the court system, and protects the rights of each Classes member.

4 43. The prosecution of separate actions by individual Classes members
 5 would create a risk of adjudications with respect to them that would, as a practical
 6 matter, be dispositive of the interests of the other Classes members not parties to
 7 such adjudications or that would substantially impair or impede the ability of such
 8 non-party Class members to protect their interests.

9 44. Defendant have acted or refused to act in respects generally applicable
 10 to The Classes, thereby making appropriate final and injunctive relief with regard
 11 to the members of the Classes as a whole.

12 **FIRST CAUSE OF ACTION**

13 **Negligent Violations of the Telephone Consumer Protection Act**

14 **47 U.S.C. §227(b).**

15 **On Behalf of the ATDS Class and ATDS Revocation Class**

16 45. Plaintiff repeats and incorporates by reference into this cause of action
 17 the allegations set forth above at Paragraphs 1-44.

18 46. The foregoing acts and omissions of Defendant constitute numerous
 19 and multiple negligent violations of the TCPA, including but not limited to each
 20 and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular
 21 *47 U.S.C. § 227 (b)(1)(A)*.

22 47. As a result of Defendant's negligent violations of *47 U.S.C. § 227(b)*,
 23 Plaintiff and the Class Members are entitled an award of \$500.00 in statutory
 24 damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)*.

25 48. Plaintiff and the ATDS Class and ATDS Revocation Class members
 26 are also entitled to and seek injunctive relief prohibiting such conduct in the future.

27 ///

SECOND CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b)

On Behalf of the ATDS Class and the ATDS Revocation Class

49. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-44.

50. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular *47 U.S.C. § 227 (b)(1)(A)*.

51. As a result of Defendant's knowing and/or willful violations of *47 U.S.C. § 227(b)*, Plaintiff and the ATDS Class and ATDS Revocation Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)* and *47 U.S.C. § 227(b)(3)(C)*.

52. Plaintiff and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

THIRD CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

On Behalf of the DNC Class and the DNC Revocation Class

53. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-44.

54. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(c)*, and in particular *47 U.S.C. § 227 (c)(5)*.

55. As a result of Defendant's negligent violations of *47 U.S.C. § 227(c)*,

Plaintiff and the DNC Class and DNC Revocation Class Members are entitled an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(c)(5)(B).

56. Plaintiff and the DNC Class and DNC Revocation Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

FOURTH CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227 et seq.

On Behalf of the DNC Class and DNC Revocation Class

57. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-44.

58. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of 47 U.S.C. § 227(c), in particular 47 U.S.C. § 227 (c)(5).

59. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(c), Plaintiff and the DNC Class and DNC Revocation Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(c)(5).

60. Plaintiff and the DNC Class and DNC Revocation Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests judgment against Defendant for the following:

FIRST CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b)

- As a result of Defendant's negligent violations of 47 U.S.C.

§227(b)(1), Plaintiff and the ATDS Class and ATDS Revocation Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to 47 U.S.C. 227(b)(3)(B).

- Any and all other relief that the Court deems just and proper.

SECOND CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection

Act

47 U.S.C. §227(b)

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §227(b)(1), Plaintiff and the ATDS Class and ATDS Revocation Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to 47 U.S.C. §227(b)(3)(B) and 47 U.S.C. §227(b)(3)(C).

- Any and all other relief that the Court deems just and proper.

THIRD CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

- As a result of Defendant's negligent violations of 47 U.S.C. §227(c)(5), Plaintiff and the DNC Class and DNC Revocation Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to 47 U.S.C. 227(c)(5).

- Any and all other relief that the Court deems just and proper.

FOURTH CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection

Act

47 U.S.C. §227(c)

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §227(c)(5), Plaintiff and the DNC Class and DNC Revocation

1 Class members are entitled to and request treble damages, as provided
2 by statute, up to \$1,500, for each and every violation, pursuant to 47
3 *U.S.C. §227(c)(5)*.

- 4 • Any and all other relief that the Court deems just and proper.

5 **JURY DEMAND**

6 61. Pursuant to the Seventh Amendment to the Constitution of the United
7 States of America, Plaintiff is entitled to, and demands, a trial by jury.

8 Respectfully Submitted this 26th Day of July, 2017.

9 LAW OFFICES OF TODD M. FRIEDMAN, P.C.

10
11 By: /s/ Todd M. Friedman
12 Todd M. Friedman
13 Law Offices of Todd M. Friedman
14 Attorney for Plaintiff
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